STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2001
V	No. 220271 Wayne Circuit Court
IVAN M. TIMS, Defendant-Appellant.	LC No. 97-010292

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was subsequently sentenced to serve concurrent terms of fifteen to thirty years' imprisonment for the murder conviction and two to four years for the felonious assault conviction, to be preceded by the mandatory two-year term for felony-firearm. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in failing to instruct the jury on the elements of the cognate lesser offenses of voluntary manslaughter, involuntary manslaughter, and careless, reckless, or negligent discharge of a firearm causing death. We disagree.

Generally, if the evidence presented at trial would support conviction of a cognate lesser offense, the trial court, if requested, must instruct on that offense so long as the requested instruction is consistent with the defendant's theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). On appeal, this Court reviews the record adduced at trial de novo to determine whether the evidence was sufficient to convict the defendant of the cognate lesser included offense. See, e.g., *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

A homicide may be reduced to voluntary manslaughter if the circumstances surrounding the killing demonstrate that malice was negated by adequate and reasonable provocation, that the

killing was done in the heat of passion, and that there was not a lapse of time during which a reasonable person could control his passions. *Pouncey*, *supra* at 388.

> The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. Case law has consistently held that such provocation must be adequate, namely, that which would cause a *reasonable person* to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998) (citations omitted).

Where there is no evidence from which a reasonable person could find such provocation, a voluntary manslaughter instruction is not supported. *Id*. Here, the record is devoid of any evidence that the killing was the result of provocation or was committed under the influence of passion or hot blood. Thus, the trial court properly refused to instruct on this lesser offense.[1]

The trial court was similarly correct in declining to instruct the jury on the offense of careless, reckless, or negligent discharge of a firearm causing death. MCL 752.861 provides that "[a]ny person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . ." As noted above a trial court need not accede to a request to instruct on a cognate lesser offense such as this unless the request is consistent "with [both] the evidence and defendant's theory of the case." *Lemons*, *supra* at 254. Here, defendant's theory of the case did not support the requested instruction.

In his statement to police, defendant claimed that after entering the victim's house for what he believed to be the sole purpose of purchasing marijuana, his codefendant, Richard Mendoza, produced a gun and pointed it at the victim. Defendant further claimed that a struggle ensued when the victim rushed Mendoza and that the shooting occurred during this struggle. Although defendant admitted to inadvertently becoming involved in this struggle when the two fell backward onto him, he denied ever shooting a gun that day and further claimed that he was unaware of Mendoza's assaultive intentions, or that Mendoza even possessed a weapon, at the time the two entered the victim's home. Given this statement of events, even were we to assume that the fatal shot was the result of careless, reckless, or negligent mishandling of a firearm, defendant's claimed involvement in the incident was insufficient to support a finding that defendant, either himself or as an aider and abettor, was in any way responsible for the gun's discharge. As noted above, defendant claimed not to have fired a gun that day, thereby seeking to absolve himself of any culpability as a principal in the killing. Similarly, because guilt on a theory of aiding and abetting requires both "[k]nowledge of the principal's criminal purpose and

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[1] In reaching this conclusion we recognize defendant's assertion that "imperfect self-defense" can reduce a charge of second-degree murder to a charge of voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). However, defendant never advanced a theory of imperfect self-defense at trial, nor did he request the voluntary manslaughter instruction on the basis that imperfect self-defense mitigated his crime to manslaughter. Defendant may not, therefore, prevail in his argument that a voluntary manslaughter instruction was warranted on this theory. See *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999).

a conscious sharing of the act," as well as participation in an enterprise the scope of which is such that the result was reasonably foreseeable, *People v Pitts*, 84 Mich App 656, 659-660; 270 NW2d 482 (1978), defendant's theory of the case is inconsistent with a finding of guilt as an aider and abettor. Although acknowledging that he accompanied Mendoza to the victim's home in order to purchase marijuana, defendant specifically denied doing so with any knowledge that Mendoza was armed with a hand gun, or that he intended to rob or shoot the victim. Thus, neither gun play nor death was a reasonably foreseeable result of the codefendants' common enterprise as allegedly understood by defendant. Therefore, because the requested instruction was inconsistent with defendant's theory of the case, the trial court was not required to grant defendant's request to instruct on this offense. *Lemon*, *supra*. [2]

Similarly, because defendant failed to request an instruction on involuntary manslaughter, the trial court had no obligation to instruct on that lesser offense. *People v Kuchar*, 225 Mich App 74, 77; 569 NW2d 920 (1997). Nonetheless, we conclude that even had defendant made such a request, instruction on this offense was not warranted by the evidence.

Involuntary manslaughter is the unintentional killing of another, without malice, by (1) "'doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm,'" (2) "'negligently doing some act lawful in itself,'" or (3) negligently failing "'to perform a legal duty.'" *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW2d 609 (1923). Although these theories are not mutually exclusive, the only theory even arguably applicable here is the first, i.e., that the killing occurred during the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm. However, whether based on the sequence of events as testified to by the victim's nephew, Thurman Chillers, or that given by defendant in his statement to police, the facts demonstrate that the killing took place during the course of an unlawful act that constituted a felony. Under either version of the events, the victim was shot while trying to defend himself against a felonious assault perpetrated by defendant's codefendant. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) ("The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with an intent to injure or place the victim in reasonable apprehension of an immediate battery."). Moreover, a struggle involving a loaded weapon is the type of action that naturally tends to cause death or great bodily

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[2] Further, where, as here, the requested lesser offense is a misdemeanor and the greater offense is a felony, the evidence at trial must not merely support a conviction of the lesser offense, but must do so based on a "rational view" of that evidence. See *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). Here, when viewed in its entirety, the evidence at trial does not rationally support defendant's claimed version of events. Forensics evidence introduced at trial indicated that the fatal bullet was not, as alleged by defendant, fired at close range. Moreover, while it could not be conclusively determined that Mendoza had recently fired a gun, the same was not true of defendant. Furthermore, the medical examiner concluded that the victim was killed by a .22 caliber bullet that was traced to a nickel-plated revolver found by police in the trunk of defendant's car and identified by Chillers as that possessed by defendant during the incident.

harm. Accordingly, because the elements of involuntary manslaughter were not supported by the record evidence, defendant was not entitled to instruction on that offense.[3]

II

Defendant next argues that the evidence was insufficient to submit the charge of first-degree premeditated murder to the jury, or to sustain a conviction for second-degree murder. With respect to each of these arguments, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. See *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998); *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Upon such review, we find defendant's arguments to be without merit.

> In order to convict a defendant of first-degree [premeditated] murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998) (citations omitted).

Moreover, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In this case, when viewed favorably to the prosecution, the evidence shows that on the day before the killing defendant accompanied Mendoza to the victim's house where the two purchased marijuana. When they returned to the house the following day, Mendoza entered alone and inquired as to the price of an additional ounce of marijuana. Mendoza then left the house, ostensibly to get more money, and returned a few minutes later with defendant. At that point, Mendoza drew a gun and pointed it at the victim. When the victim's nephew stood up, defendant produced a silver revolver, at which time Mendoza ordered defendant to "shoot him." Defendant pointed the gun at the victim's nephew but then turned his attention to the victim, at which point the nephew escaped. The reasonable inferences to be drawn from the codefendants' actions were that they surveyed the victim's house the day before the shooting. On the day of the shooting, Mendoza entered the house alone to confirm who was there and where they were in terms of location. When he returned with defendant, they were prepared to kill. The victim was fatally shot with a bullet that was matched to the nickel-plated revolver found in the trunk of the car driven by defendant. Viewed most favorably to the prosecution, the evidence was sufficient

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[3] We similarly reject defendant's claim that he was denied the effective assistance of counsel as a result of defense counsel's failure to request this instruction. Because the disputed instruction was not supported by the evidence, counsel was not ineffective in failing to make the request. See *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996) (the "failure to request an instruction inapplicable to the facts at bar does not constitute ineffective assistance of counsel").

to support submission to the jury on a charge of first-degree murder, under an aiding and abetting theory or otherwise.

The evidence was similarly sufficient to sustain defendant's conviction of second-degree murder. Conviction on a charge of second-degree murder requires proof sufficient to establish that the defendant caused the death of the victim, and that the killing was done with malice and without justification. See *People v Goecke*, 457 Mich 442, 463-464, 579 NW2d 868 (1998). "The malice element of second-degree murder is satisfied by showing that the defendant possessed the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result," and "can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 461-462; 584 NW2d 610 (1998). Here, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's second-degree murder conviction, either as an aider and abettor or as the principal shooter.

The evidence submitted at trial supported the conclusion that Mendoza intentionally set in motion a force likely to cause death or great bodily harm to the victim without justification when he entered the victim's house, drew his weapon, and then proceeded to point it at the victim. The evidence further supported the conclusion that defendant knew of his codefendant's plans. According to Chillers, when he arose from the couch after seeing Mendoza point his weapon at the victim, defendant produced a silver revolver of his own. This evidence supports the conclusion that defendant was ready and willing to assist Mendoza in his actions against the victim. Moreover, the fact that defendant was readily able to provide such assistance supports the conclusion that he was aware of his codefendant's intentions at the time he entered the house. While the plan may have gone awry when the victim tried to defend himself, the elements of second-degree murder were sufficiently supported by the evidence to warrant defendant's conviction of the offense as an accomplice. Similarly, inasmuch as the victim was killed by a .22 caliber bullet traced to the nickel-plated revolver found in the trunk of defendant's car, Chillers' testimony that defendant possessed a silver revolver during the incident was sufficient to support a finding that defendant was the principal shooter.

III

Defendant next argues that the prosecutor committed misconduct in her closing argument because she misled the jury with regard to the law. Defendant argues that the prosecutor's argument deprived him of a fair trial and warrants reversal of his conviction. We disagree.

Rebuttal comments of a prosecutor are not reviewed in a vacuum. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). "This scope of review is important because an otherwise improper remark may not rise to error requiring reversal" where the prosecutor is simply responding to a defendant's argument. *Id.* In this case, the prosecutor's arguments were responsive to defense counsel's argument. Counsel focused on defendant's conduct after the crime in an effort to negate any criminal intent at the time of the crime. The prosecutor argued in rebuttal that the focus was not on post-crime conduct and that the jury would not hear an instruction that would allow the focus to be on defendant's actions after the crime. Nevertheless, even if the prosecutor's comments could be construed as indicating that post-crime conduct was

completely irrelevant, which would not be a correct statement of the law, the error would not require reversal. The prosecutor also told the jury that it should consider everything, and cautioned that neither her argument nor that of defense counsel constituted evidence. Similarly, the trial court instructed the jury that the lawyers' statements were neither the law nor evidence. The trial court properly instructed the jury that intent could "be proved by what [defendant] said, what he did, how he did it or by any other facts and circumstances in evidence." Under the circumstances, the prosecutor's comments did not deny defendant a fair and impartial trial.

IV

Defendant next argues that the trial court abused its discretion when it allowed a witness to testify after the witness violated a sequestration order. Again, we disagree.

In order to have a witness' testimony excluded for violation of a sequestration order, a defendant must demonstrate that he was prejudiced. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). Defendant has failed to demonstrate any prejudice. There is no evidence of a conspiracy to manufacture testimony, or that the witness conformed his testimony to that of any other witness or otherwise changed his testimony in any significant way from that which he gave at the preliminary examination. Furthermore, we note that defendant was given the opportunity, if desired, to cross-examine the witness about violating the sequestration order. Under these circumstances, we do not believe the trial court abused its discretion in allowing the witness to testify. See *People v Boose*, 109 Mich App 455, 475; 311 NW2d 390 (1981).

V

Defendant next argues that he was denied his right to a fair trial as a result of the trial court's decision to excuse a juror mid-trial. A trial court's decision to excuse a juror is governed by MCL 768.18, which provides in pertinent part:

> Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

This Court will reverse a trial court's decision to remove a juror only when there has been a clear abuse of discretion and the defendant can show prejudice. *People v Weatherspoo*n, 171 Mich App 549, 560; 431 NW2d 75 (1988). We find neither in this case.

Testimony offered at the hearing conducted by the court on this matter indicated that before being excused the subject juror was approached by a member of the victim's family and questioned concerning the possibility of mutual acquaintances. Although acknowledging that he had been ordered to speak with no one during the course of the trial, the juror admitted to answering the family member's questions – conduct that ultimately led to speculation that the juror's brother may have somehow been connected with the defendants. Although the court initially declined to remove the juror on these facts, it reconsidered the matter after learning that the juror may have also spoken to defendant while leaving the courtroom following a break in the testimony, and that he may have additionally engaged in a conversation with another juror while

in the presence of defendant's girlfriend. Under these circumstances, we do not believe that the trial court abused its discretion in removing the juror from further service on the panel. See *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000) (a trial court abuses its discretion when it makes a determination that is so grossly violative of fact and logic that it defies reason and amounts to passion or bias). While much of the information concerning the juror's conduct was speculative or unclear, the controversy created a sufficient question regarding the juror's ability to impartially serve so as to render the trial court's decision to excuse the juror a proper exercise of judicial discretion.

Further, we do not find any prejudice to defendant as a result of this decision. Contrary to defendant's assertion, the trial court's decision to excuse the juror protected, rather than hindered, his fundamental right to have a fair and impartial jury decide his case. *People v Dry Land Marina, Inc*, 175 Mich App 322, 326; 437 NW2d 391 (1989). Defendant contends that the trial court's refusal to instruct the jury that the juror was excused as a result of improper conduct on the part of the victim's family or, in the alternative, to allow the juror to remain on the panel for the remainder of trial and excuse him as an alternate before deliberations, was an extraneous factor that influenced the jury to his detriment. We find nothing to support such a conclusion on this record. With respect to the premise for the juror's removal, the remaining members of the panel were not told why the juror was being dismissed, but rather were simply informed that the juror's discharge was the fault of neither party. There is no basis to believe that the panel would have held either party accountable for the dismissal and, accordingly, no basis for reversal on this claimed error.

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens